

BRIEF OF RESPONDENTS/APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 01-1168 AND 03-1281

VISTA COMMUNICATIONS, INC.,

Petitioner/Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents/Appellee.

ON PETITION FOR REVIEW OF AN APPEAL FROM ORDERS
OF THE FEDERAL COMMUNICATION COMMISSION

R. HEWITT PATE
ASSISTANT ATTORNEY GENERAL

MAKAN DELRAHIM
DEPUTY ASSISTANT ATTORNEY GENERAL

CATHERINE G. O'SULLIVAN
ANDREA LIMMER
ATTORNEYS

UNITED STATES
DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

JOHN A. ROGOVIN
GENERAL COUNSEL

DANIEL M. ARMSTRONG
ASSOCIATE GENERAL COUNSEL

STEWART A. BLOCK
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

1. *Parties and Amici:*

According to the Commission's records, all parties, intervenors and *amici* appearing before the Commission on the matter relevant to this petition/appeal are listed below:

Vista Communications, Inc.
Federal Communications Commission
United States of America

2. *Rulings Under Review:*

Case No. 01-1168

Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service:

Report and Order and Memorandum Opinion and Order, 15 FCC Rcd 1497 (1999)
(JA 327)

Second Order on Reconsideration of the Report and Order and Memorandum Opinion and Order, 15 FCC Rcd 25020 (2000) (JA 423)

Case No. 03-1281

Letter to E. Ashton Johnston, Esq., Counsel for Vista Communications, Inc., from Margaret Wiener, Chief, Auctions and Industry and Analysis Division, 16 FCC Rcd 12430 (A&AID 2001) (JA 86)

Vista Communications, Inc., Order on Reconsideration, 18 FCC Rcd 2540 (WTB 2003)
(JA 166)

Vista Communications, Inc., Order on Application for Review, 18 FCC Rcd 16957 (2003)
(JA 199)

3. *Related Cases:*

This case has not previously been before this Court. There are no related cases in this or any other court.

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GLOSSARY

<i>218-219 MHz Flex NPRM</i>	<i>Amendment of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, Order, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, 13 FCC Rcd 19064 (1998) (JA 279)</i>
<i>218-219 MHz Restructuring Order</i>	<i>Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, Report and Order and Memorandum Opinion and Order Report and Order, 15 FCC Rcd 1497 (1999) (JA 327)</i>
A&AID	FCC Auction and Industry Analysis Division
Bureau	FCC Wireless Telecommunications Bureau (also "WTB")
<i>Bureau Order</i>	<i>Vista Communications, Inc, Order on Reconsideration, 18 FCC Rcd 2540 (WTB 2003) (JA 166)</i>
Commission/FCC	Federal Communications Commission
<i>Commission Order</i>	<i>Vista Communications, Inc., Order on Application for Review, 18 FCC Rcd 16,957 (2003) (JA 199)</i>
Division	FCC Auction and Industry Analysis Division (also "A&AID")
<i>Division Letter</i>	<i>Letter to E. Ashton Johnston, Esq., Counsel for Vista Communications, Inc., from Margaret Wiener, Chief, Auctions and Industry and Analysis Division, 16 FCC Rcd 12430 (A&AID 2001) (JA 86)</i>
<i>Grace Period Clarification PN</i>	<i>Wireless Telecommunications Bureau Staff Clarifies "Grace Period" Rule for IVDS "Auction" Licensees Paying By Installment Payments, 10 FCC Rcd 10724 (WTB 1995) (JA 22)</i>
IVDS	Interactive Video and Data Service (now known as "218-219 MHz Service")
<i>IVDS Omnibus Order</i>	<i>In re Interactive Video and Data Service (IVDS) Licensees, Order 11 FCC Rcd 1282 (1995) (JA 274)</i>
MHz	Megahertz, a frequency of million cycles per second

GLOSSARY

Second Recon Order

Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, Second Order on Reconsideration of the Report and Order and Memorandum Opinion and Order, 15 FCC Rcd 25020 (2000) (JA 423)

Vista

Vista Communications, Inc.

Waiver Orders

Collectively, the Division Letter, Bureau Order, and Commission Order

Waiver Request

Letter to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, from E. Ashton Johnston, Esq., dated June 1, 1999 (JA 27)

Waiver Supplement

Letter to Thomas Sugrue, Chief, WTB, FCC, from E. Ashton Johnston, Esq., dated Dec. 8, 1999 (JA 79)

WTB

FCC Wireless Telecommunications Bureau

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BRIEF OF RESPONDENTS/APPELLEE

STATEMENT OF ISSUE PRESENTED

In 1995, Vista Communications, Inc. (“Vista”) was the high bidder in a spectrum license auction for two licenses to provide Interactive Video and Data Service (“IVDS”) to the public. The Federal Communications Commission (“Commission”) permitted Vista to pay its license fee in quarterly installments over the five-year life of the license, conditioning retention of the license on the full and timely payment of each installment.

Vista acknowledges that it failed to make the installment payments due on June 30, 1997, September 30, 1997, December 31, 1997, March 31, 1998, and June 30, 1998. Vista also concedes that it did not request a grace period prior to or upon the default date of any of those

missed payments. Accordingly, under the applicable FCC rules, Vista's licenses cancelled for non-payment on the 91st day after its missed June 30, 1997 payment, *i.e.* September 29, 1997. As a result of the automatic cancellation of Vista's licenses, the Commission determined that Vista was not eligible for the license debt "restructuring" that the Commission offered existing IVDS licenses.

Vista sought reconsideration of the Commission's determination that it was not eligible to participate in the IVDS license restructuring. On June 1, 1999, more than 18 months after the licenses canceled, Vista filed a request for waiver of the automatic cancellation provisions of the installment payment rules. In the Orders on Review, the Commission rejected Vista's petition for reconsideration of its ineligible status under the Commission's restructuring orders,¹ and the Commission rejected Vista's request for a waiver of the automatic cancellation rules.²

In these circumstances, the question presented is:

Whether the Commission abused its discretion in determining that Vista was ineligible for participation in the debt restructuring orders, and in denying the waiver requested by Vista.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 2342(1) and 47 U.S.C. § 402(a) and (b).

¹ *Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service*, Report and Order and Memorandum Opinion and Order, 15 FCC Rcd 1497 (1999) ("218-219 MHz Restructuring Order") (JA 327); Second Order on Reconsideration of the Report and Order and Memorandum Opinion and Order, 15 FCC Rcd 25020 (2000) ("Second Recon Order") (JA 423).

² Letter to E. Ashton Johnston, Esq., Counsel for Vista Communications, Inc., from Margaret Wiener, Chief, Auctions and Industry and Analysis Division, 16 FCC Rcd 12430 (A&AID 2001) ("Division Letter") (JA 86); *Vista Communications, Inc.*, Order on Reconsideration, 18 FCC Rcd 2540 (WTB 2003) ("Bureau Order") (JA 166); *Vista Communications, Inc.*, Order on Application for Review, 18 FCC Rcd 16957 (2003) ("Commission Order") (JA 199).

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in the statutory addendum to this brief.

COUNTERSTATEMENT

This case concerns Vista's attempt to avoid the consequences of its failure to comply with the express terms of a spectrum license issued by the Commission under its statutory auction authority. After its installment payment on March 31, 1997, Vista ceased to make any installment payments for over a year, missing five mandatory quarterly installment payments in a row. Moreover, during this period, Vista did not take advantage of the "grace period" provided in the Commission's rules that would have prevented automatic license cancellation. In the decisions on review, the Commission carefully reviewed the circumstances raised by Vista and determined that (1) Vista was not eligible for restructuring of future installment payments because its licenses had already cancelled; and (2) a waiver of the automatic cancellation rule was not appropriate under the circumstances. The Commission's decisions were consistent with its precedent strictly enforcing the automatic cancellation rule, and were not arbitrary and capricious.

A. Statutory and Regulatory Framework

The Commission's Auction of Spectrum Licenses Under the Communication Act. The Communications Act of 1934, as amended, establishes a system for licensing the use of radio spectrum, and vests in the FCC the exclusive authority to grant radio licenses. 47 U.S.C. § 301. Since 1994, the Commission has used spectrum auctions to assign certain wireless licenses where mutually exclusive applications exist. *See* 47 U.S.C. § 309(j).

Section 309(j) requires, *inter alia*, that the FCC design auctions to "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups

and women are given the opportunity to participate in the provision of spectrum-based services.”

47 U.S.C. § 309(j)(4)(D).

The Applicable Installment Payment Rules. Implementing its auction authority, the Commission adopted rules allowing small businesses to pay their winning bid in installments over the license term. *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Second Report and Order, 9 FCC Rcd 2348, ¶ 229 (1994). Where licensees elected to use installment payments, the Commission’s rules required that each license is conditioned on the “full and timely” performance of the licensee’s payment obligations under the installment plan, and the rules specify automatic cancellation, without further action of the Commission, if the condition is not met. *See* 47 C.F.R. § 1.2110(e)(4)(1994) (requiring that each license under the installment payment plan contain such a condition).³

If an installment payment was not paid by its due date, it was “delinquent.” 47 C.F.R. § 1.2110(e)(4)(i)(1994). If a payment remained delinquent for more than 90 days, the payment was in “default” and the license automatically cancelled without further action by the Commission. *Id.* at § 1.2110(e)(4)(i), (iii)(1994). Thus, in effect, a licensee had a 90-day window to make a late payment to avoid automatic cancellation. In addition, the rules during the relevant time period also allowed a licensee in financial distress to seek a “grace period” – in which the payment obligation would be suspended for an additional period of three to six

³ When first adopted in June 1994, the applicable installment payment rules were numbered § 1.2110(d)(4). On August 15, 1994, the numbering of the applicable installment payment rule was revised to § 1.2110(e)(4). That numbering remained effective during the period relevant here, and will be used in this brief unless otherwise noted.

months. 47 C.F.R. § 1.2110(e)(4)(ii)(1994). A grace period request could be filed in anticipation of or upon default. *Id.*

The rules made it clear that a payment default (*i.e.*, more than 90-days overdue) without filing a grace period request resulted in automatic cancellation of the license without further action by the Commission. *See* 47 C.F.R. § 1.2110(e)(4)(iii):

Following expiration of any grace period without successful resumption of payment, or upon denial of a grace period request, or upon default with no such request submitted, the license will automatically cancel and the Commission will initiate debt collection procedures pursuant to Part 1, Subpart O of the Commission's Rules.

In June 1995, the Commission's Wireless Telecommunications Bureau staff issued a Public Notice to all licensees explaining in detail the operation of the installment payment rules, and making clear that a grace period request must be filed "prior to the expiration of the 90 days following the payment due date." FCC Public Notice, "Wireless Telecommunications Bureau Staff Clarifies 'Grace Period' Rule for IVDS 'Auction' Licensees Paying By Installment Payments," 10 FCC Rcd 10724 (WTB 1995) ("*Grace Period Clarification PN*") (JA 22).

Although the *Grace Period Clarification PN* was issued by the FCC staff on "delegated authority," the Commission itself reiterated the same instructions to licensees in the *IVDS Omnibus Order*⁴ specifying that a grace period request may be filed "at any time during the first 90 days following a missed installment payment." *IVDS Omnibus Order*, ¶ 19 (JA 277).

⁴ *In re Interactive Video and Data Service (IVDS) Licensees*, Order 11 FCC Rcd 1282 (1995) ("*IVDS Omnibus Order*") (JA 274).

The 90-day delinquency period, with the availability of a grace period at the Commission's discretion within that 90-day window, was operative during the time period relevant to this case.⁵

The Installment Payment Requirements For IVDS Licensees. In July 1994, the Commission conducted an auction of 594 licenses for a new interactive video and data service ("IVDS"). The interactive video and data service was conceived as a wireless technology enabling subscribers to employ "interactive television" using a wireless device – such as shopping from home using their television. The IVDS licenses were issued for a five-year term.

The IVDS auction was the second auction of spectrum licenses conducted by the Commission, and the first in which small businesses were permitted to use installment payments. *See Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Fourth Report and Order*, 9 FCC Rcd 2330, ¶ 54 (1994) (permitting small businesses to use installment payments for IVDS licenses). Licensees qualified to pay their winning bids in installments were required to make a down payment of 20 percent of the winning bid amount, and permitted to pay the balance over the license term, with payments of interest only for the first two years, and principal and interest amortized over the last three years of the license term. The first installment payment for IVDS licenses was initially due on March 31, 1995.

⁵ In December 1997, the Commission modified the installment payment rules, effective on March 16, 1998. *See Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Third Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Rcd 374 (1997). Under the new rules, the Commission provided for two automatic 90-day grace periods and eliminated the availability of any additional "grace period" at the Commission's discretion under the old rules. *See* 47 C.F.R. § 1.2110(f)(4)(1998), now renumbered § 1.2110(g)(4). Thus, under the new installment payment rules, a licensee had 180-days to make its installment payment, and failure to make such payment resulted in automatic cancellation on the 181st day. *See Celtronix Telemetry, Inc. v. FCC*, 272 F.3d 585 (D.C. Cir. 2001), *cert. denied*, 536 U.S. 923 (2002) (affirming the Commission's authority to revise installment payment rules for existing licensees).

The technology upon which the IVDS service was based did not develop as predicted. As a result, based on the requests of many IVDS licensees, the initial installment payment was postponed from March 31, 1995 to June 30, 1995, and that payment was eventually suspended until January 5, 1996. The installment payments for September 1995 and December 1995 were also suspended, to be made up at a later date. During this same timeframe many IVDS licensees also requested grace periods to suspend individual payment obligations. The actions of the Commission and staff early in the history of the installment payment requirements of IVDS licenses in the 1995-1996 period is summarized in the *218-219 MHz Flex NPRM*, ¶ 9.⁶

Because the initial installment payments were delayed from March to June 1995, and then to January 1996, licensees received several announcements regarding payment obligations, each superseding the other. *See* FCC Billings and Collection Branch “Notice to IVDS Licensees,” dated March 10, 1996 (JA 65).⁷ In addition, because some licensees had voluntarily made the suspended payments while other licensees had not, the March 10, 1996 Notice informed all licensees that a final accounting and true up of payments for each licensee would be calculated in September 1999 (near the end of the license term), and that individual licensees would be notified at that time “of any deficiencies or excesses.” *Id.* (JA 65).

⁶ *Amendment of the Commission’s Rules to Provide Regulatory Flexibility in the 218-219 MHz Service*, Order, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, 13 FCC Rcd 19064 (1998)(“*218-219 MHz Flex NPRM*”) (JA 279).

⁷ The March 10, 1996 Notice explained to licensees that “the Commission’s Collection System software is unable to accommodate the unusual developments which disrupted/delayed some licensees in making their initial installment payments.” In a follow-up letter from the Billings and Collection Branch, dated March 29, 1996 (JA 70), the agency also noted that the government-wide furlough and snow emergency in December 1995 and January 1996 had contributed to the confusion and delay in getting accurate advice out to IVDS licenses regarding the January 5, 1996 installment payment requirements.

In a follow-up correspondence dated March 29, 1996 (JA 70), the Billings and Collection Branch sought to answer questions raised by some IVDS licensees about the status of their payments. The March 29, 1996 letter stated that the Commission would continue to defer the September 1995 and December 1995 installment payments to a later date to be determined, and that only the June 30, 1995 installment payment was required to have been paid on January 5, 1996. The March 29, 1996 letter also sought to dispel any view by licensees that the planned review of individual accounts in September 1999 to determine any deficiencies due at that time meant that all installment payments were suspended until September 1999. Accordingly, the March 29, 1996 letter emphasized that “the five-year payment schedule is still in effect.” *Id.* (JA 70). The March 29, 1996 letter also again called attention to the availability of grace periods under the rules, and advised licensees that any grace period must be filed within the 90-day deficiency period. *Id.* (JA 70).

In sum, although the initial installment payments had been suspended in 1995, and then resumed in early 1996, the payments due thereafter – beginning with the March 31, 1996 payment – were due and payable on the regular schedule, and none of the future scheduled installment payments were suspended. The payments due during the 1997 calendar – which are the focus of this case – were never suspended, and were fully due in a timely manner under the Commission’s rules.

The 218-219 MHz Restructuring Orders. In light of the continued unavailability of equipment necessary for interactive television service, the Commission, in September 1998, commenced a rulemaking proceeding to determine how to address the future of the IVDS licenses. *See 218-219 MHz Flex NPRM* (JA 279). To give more flexibility to licenses, the Commission proposed technical modifications to promote the use of the band for a variety of

communications services. To reflect the new flexibility, the Commission renamed the service as the “218-219 MHz Service.” *Id.* at ¶ 16 (JA 290).

To avoid license cancellations while the restructuring matter was pending, the Commission suspended all future installment payments due for 218-219 MHz Service licenses, and suspended all action on pending grace period requests. *218-219 MHz Flex NPRM*, ¶ 13 (JA 288).⁸

The *218-219 MHz Flex NPRM* proposed to limit the availability of restructuring to IVDS licenses that had not previously cancelled for non-payment. The NPRM proposed that all IVDS licensees that had made full and timely installment payments through March 16, 1998, or were within the 90-day deficiency period at that date, or had filed timely grace period requests by that date, were “eligible” for participation in the future restructuring order. Licensees whose licenses had already cancelled would be ineligible for restructuring. *218-219 MHz Flex NPRM*, ¶ 13 (JA 288).

On September 10, 1999, the Commission adopted its restructuring order. *See 218-219 MHz Restructuring Order*.⁹ In order to maximize the efficient use of the band, the Commission, *inter alia*, modified the technical rules for the service, and extended the license term from five to ten years. *Id.* at ¶ 31 (JA 347). The Commission offered “eligible” licensees three restructuring options (*id.* at ¶¶ 33-54) (JA 348-59):

⁸ The new 180-day payment period had become effective on March 16, 1998 (*see note 5, supra*). Licensees therefore had until September 28, 1998 to make their installment payments and avoid automatic cancellation. The effect of the suspension of installment payments in the *218-219 MHz Flex NPRM*, therefore, was to avoid automatic cancellation of licenses for non-payment of the March 31, 1998 installment payment.

⁹ *Amendment of Part 95 of the Commission’s Rules to Provide Regulatory Flexibility in the 218-219 MHz Service*, Report and Order and Memorandum Opinion and Order, 15 FCC Rcd 1497 (“*218-219 MHz Restructuring Order*”) (JA 327).

- (1) ***reamortization and resumption*** – under which a licensee’s outstanding installment obligations would be reamortized over an additional five years coterminous with an extended license term;
- (2) ***amnesty*** – under which a licensee could turn in its original license for release of its outstanding installment payment obligations and refund of all installment payments previously made (other than the initial down payments required to obtain the license); or
- (3) ***prepayment*** – under which a licensee must prepay the entire outstanding principal of any license it wishes to retain, and may use as part of the prepayment up to 85% of the down payment for any licenses returned for debt forgiveness.

The Commission adopted the eligibility limitation proposed in its NPRM, and restricted restructuring relief to “eligible licenses,” which it defined as (*id.* at ¶¶ 4, 37, JA 330, 350):

IVDS licensees that (i) were current in installment payments; (ii) were less than ninety days delinquent on the last payment due before March 16, 1998; or (iii) had properly filed grace period requests under the former installment payment rules.

The Commission found that “[a]llowing [ineligible licensees] to fully participate in the restructuring program would be unfair to licensees that have complied with the Commission’s rules and made payments and/or properly filed grace period requests.” *Id.* at ¶ 37 (JA 350).

Significantly, however, the Commission also recognized that, in light of the special circumstances facing IVDS licensees, it was appropriate to grant “ineligible” licensees debt forgiveness of their outstanding auction debt,¹⁰ and a refund of all installment payments made (apart from down payments). *See 218-219 MHz Restructuring Order*, ¶ 38 (JA 350-51). Thus, the relief received by ineligible licensees was identical to the “amnesty” option offered to eligible licensees under the *218-219 MHz Restructuring Order*. *Compare, id.* ¶ 38 (JA 350), with ¶ 50 (JA 357).

¹⁰ Under the applicable installment payment rules, 47 C.F.R. § 1.2110(e)(4)(iii)(1994), upon default the outstanding auction bid amount still remained an obligation of the winning bidder and was subject to debt collection.

The Commission reaffirmed its eligibility determination in the *Second Recon Order* (JA 423).¹¹

B. Vista's Failure To Make Timely Payment.

Vista was the winning bidder on two IVDS licenses (Eugene, Oregon and Salem, Oregon) in the July 1994 auction. *See* Interactive Video and Data Service (IVDS) Applications Accepted For Filing, Public Notice, 9 FCC Rcd 6227 (1994) (JA 1). As a small business, Vista was eligible to pay for its winning bids through the Commission's installment payment plan. As with all other IVDS licenses under the installment payment plan, each of Vista's licenses was specifically conditioned, on the face of the license, on the full and timely performance of all installment payment obligations (JA 16):

[T]his authorization is conditioned on the full and timely payment of all moneys due the Government pursuant to sections 1.2109, 1.2110 and 95.816 of the Commission's Rules. . . . For eligible entities paying by installment payments, payments must be made in accordance with the Commission's Rules and the terms of the Commission's Installment Payment Plan.

Vista received an installment payment plan from the Commission staff on February 27, 1995 (JA 36). It made its first installment payment on June 29, 1995 (JA 23), before it learned that the Commission staff had granted the request of other licensees for an emergency stay of that payment. Vista did not make the September 1995 and December 1995 payments because those payments were covered by the staff's stay order. When the Commission lifted the stay in December 1995, and ordered payments to resume on January 5, 1996, Vista paid the deferred September and December 1995 installments at that time (JA 147). When the Billings and

¹¹ *Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service*, Second Order on Reconsideration of the Report and Order and Memorandum Opinion and Order, 15 FCC Rcd 25020 (2000) ("*Second Recon Order*") (JA 423).

Collection staff letter of March 29, 1996 (JA 70) clarified that only the deferred June 1995 installment had been required in the January 5, 1996 payment, and that the September and December 1995 installment would continue to be deferred until a later date, Vista realized that its January 5, 1996 payment had brought it two payments ahead of the required schedule for each license.

Vista received a revised installment payment schedule from the FCC's Billings and Collections Branch in March 1996, showing the required quarterly installment payments from March 31, 1996 forward through the end of the license term in December 1999. (JA 68-69). Consistent with that installment payment schedule, Vista began making regular installment payments on its licenses. Vista made the installment payments due on March 31, 1996, June 30, 1996 and March 31, 1997.¹² See (JA 156, 157, 161) (Vista cover letters for each payment). *See also* (JA 24-26) (June 10, 1998 letter from FCC staff summarizing Vista's payments). Vista skipped the installment payments due on September 30, 1996 and December 31, 1996, taking the position that it was already two payments ahead, having mistakenly already paid the September and December 1995 installment payments in its January 5, 1996 payment. Vista thus sought to bring its payment amounts in line with other installment payment licensees. Vista informed the Commission by letter that it was skipping the September 30, 1996 and December 31, 1996 payments. (JA 158, 159). The Commission took no action against Vista for not making these two installment payments.

¹² Vista paid the installment payment due on March 31, 1997 on May 23, 1997 (taking advantage of the 90-day delinquency period allowed in the Commission's rules).

After the March 31, 1997 installment payment, Vista made no other payments. Specifically, Vista failed to pay five consecutive installment payments between June 1997 and June 1998. None of the installment payments due in calendar year 1997 were deferred or suspended by the Commission.¹³ Vista did not communicate with the Commission during this time frame regarding its reasons for not making the required payments. Nor did Vista file a request for a grace period for any of the missed payments during this timeframe. Vista does not dispute that it missed each of these payments, and does not dispute that it did not file a grace period request during the 1997-1998 time period.

Under the applicable FCC rules, 47 C.F.R. §1.2110(e)(4)(i)-(iii), Vista had a 90-day delinquency period within which either to make the June 30, 1997 payment or to file a grace period request for more time to make the payment. After the 90th day without payment or a timely filed grace period request, the licenses automatically cancelled on the 91st day – *i.e.* September 29, 1997.

Because Vista's licenses had automatically cancelled on September 29, 1997 – prior to the March 16, 1998 cut off date on eligibility for participation in the 218-219 MHz Restructuring Orders – it was not listed as among the licenses “eligible” for restructuring in the *218-219 MHz Flex NPRM*, issued on September 17, 1998. The Commission adopted that proposed eligibility restriction in the *218-219 MHz Restructuring Order*, issued on September 10, 1999. Vista was specifically informed of its ineligible status by letter from the FCC staff in January 2000.¹⁴

¹³ As noted, *supra*, the Commission in the *218-219 MHz Flex NPRM* on September 17, 1998 suspended all further payments by IVDS licensees. But that order did not relieve Vista of its obligations for the payments due between June 30, 1997 and March 16, 1998.

¹⁴ See, e.g., Letter to Elizabeth Michaels, from Rachel Kazan, Chief, Auctions Finance and Market Analysis Branch, Wireless Telecommunications Bureau, dated January 4, 2000 (JA 82).

C. The Orders On Review.

(1) The Commission’s Denial of Vista’s Petition for Reconsideration of the 218-219 MHz Service Restructuring Order “Eligibility” Criteria.

Vista filed a petition for reconsideration of the eligibility standards adopted by the Commission in the *218-219 MHz Restructuring Order*. Petition for Reconsideration and Clarification, submitted by Vista Communications, Inc., Dec. 3, 1999 (JA 415). Vista argued that it would be inequitable to permit licensees that filed for grace periods in the past (and thus missed some required installment payments) to retain their licenses in the *218-219 MHz Restructuring Order*, while licensees such as Vista, which made some payments, were denied participation. Vista requested that the definition of “eligible licensees” be modified to include those licensees that have made what Vista referred to as “substantial payments.” In the alternative, Vista requested that former licensees be able to make a retroactive payment sufficient to be deemed current as of March 16, 1998.

The Commission rejected Vista’s request in the *Second Recon Order*.¹⁵ The Commission found that the inclusion of licensees that had filed a grace period request among “eligible licenses” was appropriate, and consistent with the treatment of grace period requests in other services. *Id.* ¶ 27 (JA 435). The Commission rejected Vista’s argument that Vista should have been deemed eligible because it made “substantial” payments (even if not all required payments). The Commission held that the standard proposed by Vista was too subjective, and was administratively unworkable and inherently arbitrary in requiring the Commission to determine how many payments were substantial enough to warrant inclusion among eligible licensees. *Id.*

¹⁵ *Amendment of Part 95 of the Commission’s Rules to Provide Regulatory Flexibility in the 218-219 MHz Service*, Second Order on Reconsideration of the Report and Order and Memorandum Opinion and Order, 15 FCC Rcd 25,020 (2000) (“*Second Recon Order*”) (JA 423).

Moreover, the Commission held that Vista's proposed test interfered with the integrity of the full and timely payment requirement because it required the Commission to overlook a license default. "From such a rule current licensees, in this or other services, might conclude that no consequences would flow from failure to make full and timely payment." *Id.*

The Commission also rejected Vista's argument that "myriad factors" created substantial confusion and uncertainty about licensees' payment obligations. The Commission emphasized (*Second Recon Order*, ¶ 28) (JA 435):

Although the date for the initial payment was postponed for a period of time, even the most favorable reading of the Commission's orders and letters to licensees would not lead a licensee to believe that it was excused from its obligation to make payments, or that it did not need to file a grace period request if it determined that it could not make timely payments. To the extent there was any confusion as to the precise date a particular payment was due, the Commission took that into account by defining Eligible Licensees as existing licensees that had participated in the installment payment program and "were current in installment payments as of March 16, 1998." Thus, Vista has failed to provide a reasonable explanation of a licensees' [*sic*] failure to either make payments or file a timely grace period request.

Finally, the Commission declined to adopt Vista's request that licensees be able to make retroactive late payments sufficient to be deemed "current as of March 16, 1998." *See Second Recon Order*, ¶ 29 (JA 436). The Commission concluded that granting Vista's request "would undermine the Commission's rules that timely and full payment is a condition of retaining the license." In rejecting Vista's request, the Commission noted the "ample" notice provided licensees regarding the payment rules, and the "generous provisions for Ineligible Entities provided in the *218-219 MHz Order*." *Id.*

The *Second Recon Order* was published in the Federal Register on February 7, 2001. Vista timely filed its Petition for Review in this Court on April 9, 2001. Case No. 01-1168. The

case was held in abeyance pending resolution of other related matters at the Commission. *See* Order (D.C. Cir. June 8, 2001).

(2) The Commission's Denial of Vista's Waiver Request.

After learning from the *218-219 MHz Flex NPRM* that it would not be eligible for participation in the proposed *Restructuring Order*, Vista filed a request for waiver of the automatic cancellation rules and grace period rules. Vista Waiver Request, dated June 1, 1999.¹⁶ The request was filed nearly two years after Vista missed the June 30, 1997 payment due date, and nearly eighteen months after automatic cancellation on September 29, 1997. After the Commission announced its adoption of the eligibility rules in the *218-219 MHz Order* in September 1999, Vista filed a supplement to its Waiver request on December 8, 1999.¹⁷

In its June 1999 Waiver Request, Vista acknowledged that it ceased making installment payments on its licenses after March 1997. Vista sought to explain its failure to comply with the installment payment rules as follows (Waiver Request at 5, JA 31):

Vista halted its payment out of confusion over the IVDS payment schedule and uncertainty concerning its obligations as a result of the many changes in the overall IVDS payment program. Vista did not file a grace period request at the time because it did not know it was required to do so. . . . The "Notice to IVDS Licensees" Vista received in March 1996 stated that all IVDS accounts would be reviewed in September 1999 and that licensees would be notified of deficiencies or excesses and expected to make their accounts whole by December 31, 1999. Accordingly, Vista fully expected to be given an opportunity, along with other IVDS licensees, to make current its accounts and/or otherwise participate in a revised IVDS license program should the Commission announce such revisions.

¹⁶ Letter to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, from E. Ashton Johnston, Esq., dated June 1, 1999 ("Waiver Request") (JA 27).

¹⁷ Letter to Thomas Sugrue, Chief, WTB, FCC, from E. Ashton Johnston, Esq., dated Dec. 8, 1999 ("Waiver Supplement") (JA 79).

In the December 8, 1999 Waiver Supplement, Vista asked that the Commission either treat its June 1, 1999 waiver request as timely filed, or in the alternative, asked that the Commission allow Vista to remit a retroactive payment sufficient to bring its installment payments “current” through March 16, 1998. Waiver Supplement, at 2 (JA 80).

Vista’s waiver request was rejected, first by the Wireless Bureau’s Auction and Industry Analysis Division,¹⁸ then by the Wireless Bureau on Vista’s Petition for Reconsideration,¹⁹ and finally by the Commission.²⁰ Because the Commission decision relied on and reaffirmed the Division and Bureau decisions, each is briefly summarized here.

The Division Letter. The Auctions Division rejected the waiver request in a letter order. (JA 86). The Division held that the circumstances cited by Vista did not excuse Vista’s non-compliance with the Commission’s installment payment rules.

With respect to Vista’s allegation that changes to the IVDS payment schedules in 1995 and 1996 created confusion in its payment schedule in 1997, the Division found that the Commission provided ample notice to IVDS licensees regarding the Commission’s payment rules. The Division noted that, in the *218-219 MHz Second Recon Order*, the Commission had already rejected Vista’s contention that the various payment delays and announcements in 1995 and 1996 had caused confusion about payment obligations in 1997, and quoted the Commission’s conclusion that “even the most favorable reading of the Commission's Orders and

¹⁸ Letter to E. Ashton Johnston, Esq., Counsel for Vista Communications, Inc., from Margaret Wiener, Chief, Auctions and Industry and Analysis Division, 16 FCC Rcd 12430 (A&AID 2001) (“*Division Letter*”) (JA 86).

¹⁹ *Vista Communications, Inc.*, Order on Reconsideration, 18 FCC Rcd 2540 (WTB 2003) (“*Bureau Order*”) (JA 166).

²⁰ *Vista Communications, Inc.*, Order on Application for Review, 18 FCC Rcd 16957 (2003) (“*Commission Order*”) (JA 199).

letters to licensees would not reasonably lead a licensee to believe that it was excused from its obligation to make payments, or that it did not need to file a grace period request if it determined that it could not make timely payments.” *Division Letter*, 16 FCC Rcd at 212433, *quoting Second Recon Order*, ¶ 28 (JA 89).

The Division also considered and rejected Vista’s claim that the Billings and Collection Branch letter of March 10, 1996 regarding the planned audit and true up of accounts in September 1999 confused Vista to the point that it withheld all installment payments assuming it could make up for a shortfall during the proposed review. The Division stated that such an assumption was “unreasonable,” and the Division specifically noted that the Commission had expressly informed licensees that the notice of the proposed review of accounts was not meant to indicate that installment payments were stayed. The Division further noted that the follow-up letter from the Billings and Collection Branch on March 29, 1996 explicitly stated that the dates for payments due after March 31, 1996 remained unchanged. *Division Letter*, 16 FCC Rcd at 12433-34 (JA 89-90).

The Division letter further rejected Vista’s reliance on its own alleged lack of knowledge regarding the availability of grace period requests under the Commission’s rules. The Division stated that “Vista, just as every Commission licensee, was charged with knowledge of the applicable rules,” and the Division observed that Vista admitted receiving the March 29, 1996 Commission staff letter that reminded licensees of the Commission’s rules concerning grace period requests. *Division Letter*, 16 FCC Rcd at 12434 (JA 90).

The Division Letter also considered and rejected Vista’s argument that strict application of the automatic cancellation rule would be “inequitable” under the circumstances because Vista had made several installment payments on its licenses before it defaulted. The Division found

that Vista's argument was inconsistent with the purpose of the installment payment rules and the Commission's auction program under Section 309(j) of the Communications Act. The Division stated that the Commission's auction rules serve the underlying purpose of assuring and maintaining the efficient and effective assignment of spectrum licenses. *Division Letter*, 16 FCC Rcd at 12435-36 (JA 91-92).

Finally, the Division rejected Vista's alternative request to make retroactive payments to cure its default and bring its license payments current as of March 16, 1998. The Division letter recognized that the Commission had already rejected that request in the *Second Recon Order*. The Division did not find anything new in Vista's waiver request to lead to a different result. *Division Letter*, 16 FCC Rcd at 12436 (JA 92).

The Bureau Reconsideration Order. Vista filed a Petition for Reconsideration of the Division Letter. The Bureau affirmed the *Division Letter*, finding that the Division fully examined each of Vista's allegations in detail and found that Vista's alleged lack of knowledge with respect to the grace period rules and alleged confusion failed to demonstrate unique or unusual circumstances that would warrant waiver of the rules. *Bureau Order*, ¶ 16 (JA 172).

The Bureau also specifically considered Vista's allegation that the Division had failed to address the applicability of the Commission's "down payment waiver" cases, and the "constructive waiver" cases, both of which Vista cited in support of its waiver. The Bureau found that the cited precedent was not applicable to Vista's circumstances. *Bureau Order*, ¶¶ 18-21 (JA 173-74).

The Bureau explained that the "down payment waiver" precedent cited by Vista involved situations where a winning bidder missed a down payment deadline, but could affirmatively show that it was ready and able to pay the down payment at the time it was due, and that its

payment was delayed as a result of conditions beyond its control. In contrast, Vista's non-payment was not caused by matters beyond its control and it made its own decision to ignore the payment deadline. *Bureau Order*, ¶ 19-20 (JA 173-74).

The Bureau also rejected Vista's reliance on the "constructive waiver" cases, where the Commission inadvertently continued to accept installment payments after a license automatically cancelled. The Bureau explained that none of these facts were present in Vista's case: Vista did not continue to make installment payments after cancellation, and the Commission took no action that could have led Vista to believe that it retained its licenses after the date of automatic cancellation. *Bureau Order*, ¶ 21 (JA 174).

The Commission Order. The Commission denied Vista's application for review of the *Bureau Order*. The Commission reviewed in detail the findings and reasoning of the Division and Bureau decisions (¶¶ 11-16, JA 203-206), and determined that "the Division and the Bureau each thoroughly addressed these arguments in their previous orders and correctly applied precedent." *Id.* at ¶ 17 (JA 206).

The Commission further observed that it had already addressed Vista's arguments in the context of Vista's challenge to the Commission's eligibility determination in the 218-219 MHz restructuring proceeding. The Commission declared that raising the same issues in both the rulemaking and by waiver was "a waste of administrative resources" that should be discouraged in the future. *Commission Order*, ¶ 17 n.64 (JA 206).

Vista filed a timely appeal from the Commission's order. Case No. 03-1281, which was consolidated with the earlier petition for review.

SUMMARY OF ARGUMENT

Vista's Licenses Cancelled On September 29, 1997 pursuant to the clear provisions of the Commission's Rules. Vista admits that it failed to make any of the required installment payments for its IVDS licenses after the installment due on March 31, 1997, without asking for a grace period to forestall automatic cancellation of its licenses. It was only after the Commission announced a plan to restructure the license debt for existing licenses in September 1998 – a year after its licenses automatically cancelled – that Vista reacted. What reason does Vista give the Court for its payment default? Only a non-sequitur (Vista Br. 33):

Vista's failure to make installment payments was not due to a lack of financial resources, or financial distress, but to a lack of understanding that it was required to file a grace period request.

The Court will search Vista's brief in vain for any other explanation.

Vista's licenses properly cancelled under the applicable Commission rules. Vista's assertion that the installment payment rules were not clear is belied not only on the face of the rule, but also by fact that the Commission and its staff gave consistent advice to licensees about the rule, and particularly about the necessity of filing a grace period request on or before the 90th day after a payment was due to avoid automatic cancellation. The Commission adopted a policy of strict enforcement of the installment payment deadlines, and, after duly considering Vista's arguments, the Commission found that Vista had offered no reason for the Commission to depart from that policy.

The Commission properly refused to expand its definition of "eligible" licensees to include cancelled licenses such as Vista's. In its rulemaking to restructure the future payments of IVDS licensees, the Commission was entitled to draw a line between active licenses and those already terminated. Vista's proposed expansion of eligibility to include licensees that made

“substantial” payments, notwithstanding a default, would undermine the integrity of the Commission’s overall strict enforcement of the automatic cancellation rules and would be unfair to those licensees that had in fact complied with the rules. Although Vista argues that the situation of IVDS licensees was unique because of the unavailability of the IVDS technology, the Commission appropriately took that fact into account in granting to all “ineligible” licensees the same relief granted to eligible licensee electing amnesty – a full refund of all past installment payments made, and full debt forgiveness of any outstanding indebtedness arising from the licensee’s winning bid in the IVDS auction. Fairness did not require the Commission to do more.

The Commission properly refused to grant Vista a special waiver of the automatic cancellation rule. Having rejected Vista’s request to expand the definition of eligibility, the Commission could have simply refused to hear Vista’s request for a waiver since the reasons for the waiver were identical to the already rejected request to expand eligibility and the resulting relief would have been the same. The Commission and its staff, however, took a hard look at Vista’s waiver request and rejected it on the merits. The Commission rejected the waiver request, not because it gave “short shrift” to Vista’s arguments, as Vista claims, but because it found that Vista has not met the Commission’s standards for granting a waiver request.

Vista has not met its heavy burden to show that the Commission abused its discretion in refusing to give Vista a waiver under the circumstances.

Vista’s reliance on cases involving “down payment waivers” and “constructive waivers” of the payment deadlines does not compel a different result. These situations are readily distinguishable from Vista’s, and the Commission previously rejected the same argument made

by other licensees. Accordingly, the Commission did not abuse its discretion in declining to waive its full and timely payment rule in the circumstances presented.

ARGUMENT

Vista admits that it missed five consecutive installments, without asking for a grace period to forestall automatic cancellation of its licenses. During this period, Vista never informed the Commission that it was interested in retaining its licenses, or gave any explanation for its default. It is fair to conclude that during this period, Vista simply decided to abandon its licenses. It was only after the Commission announced a plan to restructure the license debt for existing licenses in September 1998 – a year after Vista’s licenses automatically cancelled – that Vista reacted, and requested an opportunity to cure its longstanding default.

Vista’s attempted explanation of its failure to make five consecutive installment payments makes no sense. All that Vista can assert is that its failure “was not due to a lack of financial resources, or financial distress, but to a lack of understanding that it was required to file a grace period request.” Vista Br. 33. *See also id.* at 23 (“Vista did not understand at the time that it was required to file a grace period request in order to retain its licenses”). In other words, Vista’s sole defense is that it somehow believed – against the express language of Section 1.2110(e)(4)(iii) – that it could cease making payments and retain its licenses even if it did not file any grace period requests. Vista offers nothing to support its construction of the rule, and nothing to explain how it reached its unusual interpretation.

What Vista does not say in its defense is also important. It does not assert that it was misled into foregoing payments in 1997 by FCC releases or orders. Nor does it claim that it was unaware of the payment schedules, or the consequences of default, or even that the grace period rules themselves were unclear. Simple lack of understanding of the operative grace period

(ignorance of the law) has never been an acceptable excuse for failure to comply with FCC regulations. *See* 47 C.F.R. § 0.406 (“Persons having business with the Commission should familiarize themselves with those portions of its rules and regulations pertinent to such business”).

We demonstrate below that the Commission properly determined that strict enforcement of the installment payment deadlines was in the public interest, and that the Commission’s actions challenged by Vista here – its refusal to expand the definition of “eligible” licenses to accommodate Vista’s late request for a second chance, and its refusal to grant a waiver of the installment payment rules – were not arbitrary and capricious.

I. VISTA’S LICENSES CANCELLED ON SEPTEMBER 29, 1997 PURSUANT TO THE CLEAR PROVISIONS OF THE COMMISSION’S RULES.

A. The Commission’s Rules Applicable In 1997 Provided For Automatic Cancellation Of Licenses If Payment Was Not Made, Or A Grace Period Request Not Filed, Within Ninety Days Of An Installment Payment Due Date.

The installment rules applicable in 1997 provided licensees with an extra 90 days after the payment due date to make an installment payment without penalty. *See* 47 C.F.R. § 1.2110(e)(4)(i). For licensees that needed still additional time to get their payments in order, the Commission allowed licensees to apply for a grace period, which the Commission could grant in its discretion upon a showing of financial distress. *Id.* at § 1.2110(e)(4)(ii). If, however, a licensee did not pay within the 90-day delinquency period, and did not request a grace period request, the rules unambiguously provided for automatic cancellation on the 91st day. *Id.* at § 1.2110(e)(4)(iii):

Following expiration of any grace period without successful resumption of payment . . . or ***upon default with no such [grace period] request being submitted, the license will automatically cancel*** and the Commission will initiate debt collection procedures pursuant to Part 1, Subpart O. (Emphasis added.)

That rule directly applied to Vista – which did not pay the June 30, 1997 installment payment within 90 days, and which did not file a grace period request during that period. Accordingly, Vista’s licenses cancelled under the plain language of the rule.²¹ To the extent that Vista asserts that it believed that it could miss payments and retain its licenses without ever filing a grace period request (*see* Vista Br. 23), that assertion finds no support in the rules or Commission decisions which have consistently enforced automatic cancellation for an installment payment default. *See, e.g., 21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192 (D.C. Cir. 2003) (affirming the Commission’s automatic cancellation of a license for an installment payment default).

Vista suggests that the grace period rule is ambiguous, and particularly that there was no requirement that a grace period request must be filed within the 90-day delinquency period. Vista Br. 23. Vista’s reading of the rule should be rejected.

First, it should be noted at the outset that Vista has *still never* filed a grace period request under the Commission’s rules. Under the rules applicable in 1997, a properly filed grace period request required the applicant to demonstrate, by affidavit, financial distress. *See* 47 C.F.R. § 1.2110(e)(4)(ii); *Grace Period Clarification PN*, 10 FCC Rcd 10724 (WTB 1995) (specifying that a showing of financial distress must be supported by documentation and affidavits). What Vista eventually filed was a request for a *waiver* of the automatic cancellation and grace period

²¹ Vista claims that the Commission Memorandum Order adopting the installment payment rules in 1994 is vague because it says merely that a default “could result” in cancellation (Vista Br. 40). However, that language cannot overcome the plain text of the rule itself which specifies the upon default the license “***will*** automatically cancel.” 47 C.F.R. § 1.2110(e)(4)(iii) (emphasis added).

provisions of the rules, not a “late-filed” grace period request. Vista Waiver Request at 1 (JA 96). Vista cannot, by that waiver request, assert that it has ever actually complied with the grace period rules.

Second, the language of the rule itself is clear. The rule states that a grace period may be requested “upon default or in anticipation of default.” 47 C.F.R. § 1.2110(g)(4)(ii). The word “upon” (or informally “on”) when used in relation to an event typically means on “the particular occasion or circumstance.” *See* The American Heritage Dictionary of the English Language, (Third Ed. 1992), at 1263 (“on” definition 3.b) (JA 460). Thus, as used in Section 1.2110(e)(4)(ii), the term “upon default” would be interpreted to mean at the moment of default. This reasonable construction of “upon default” is further supported by Section 1.2110(e)(4)(iii), which provides for automatic cancellation on the 91st day if a licensee does not make the payment and does not file a grace period request. With this context, the grace period rule cannot be reasonably construed as creating a right to seek a grace period – *i.e.*, an extension of time to make a payment – after the license has already cancelled on the 91st day. When read in its full context, the rule is not susceptible to the reading offered by Vista.

Third, even if the Court were to find a latent ambiguity in the text of the rule, the Commission and staff have consistently interpreted and applied the rule to require that grace period requests must be filed within the 90-day delinquency period in order to be timely filed. *See Grace Period Clarification PN*, 10 FCC Rcd 10724 (WTB 1995) (JA 22); *IVDS Omnibus Order*, 11 FCC Rcd 1282 (1995) (JA 274); March 29, 1996 Billings and Collection Branch letter (JA 70). Each of these documents – released prior to Vista’s default – instructed IVDS licensees that the Commission’s rules permit licensees to file a grace period request ***within the first 90***

days after a missed payment due date. Significantly, Vista’s brief offers no statements from the Commission or staff advising licensees that they can file grace period requests after the 90th day.

The Commission has also applied this interpretation in actually enforcing the rules. *See James A. Stenger, Esq.*, 16 FCC Rcd 17621 (A&AID 2001) (holding that a grace period request under the same rules applicable in this case was “untimely” when it was filed three months after default on the 90th day).

B. Vista Had Fair Notice Of The Payment Deadlines And Its Consequences.

Although Vista suggests that it was the victim of confusing FCC notices and letters in 1995 and 1996, leaving it unsure of the payment installment payment schedules (*see* Vista Br. 8-12, 31), a closer reading of the Vista’s brief reveals that Vista is not claiming any confusion regarding the actual payments that it missed in 1997. Indeed, Vista now admits that it understood that payments were not stayed after March 1996. Vista Br. 31 (admitting that it understood the March 29, 1996 letter from the Billings and Collection Branch as making clear that payments were due quarterly beginning on March 31, 1996, and were not stayed).

Nor can Vista credibly claim that it was confused about payment due dates after March 1996, when it regularly made quarterly payments under the March 1996 payment schedule. Specifically, Vista’s awareness of the payment schedule and the importance of full and timely payments is demonstrated by the fact that in the year prior to its default (i) Vista made regular quarterly payments for March 1996, June 1996, and March 1997); (ii) Vista took care to notify the Commission that it was skipping the September 1996 and December 1996 payments because it was already two installments ahead of schedule; and (iii) Vista took advantage of the 90-day delinquency period in delaying its March 1997 payment until May 1997. In short, as the Court

recognized in *21st Century Telesis Joint Venture v. FCC*, “discrepancies in payment notices, even had they produced some genuine uncertainty, would hardly have justified 21st Century's decision to make no payment at all.” 318 F.3d at 202.²²

Vista claims that it did not understand that it could request a grace period to extend its payments. Vista Br. 33. Presumably, Vista is claiming that it was never in financial distress (*see id.* at 24), and thus did not believe it would qualify for a grace period because such relief was available only for licensees that needed more time to pay because they were in financial distress. But, even if that were the case, it does not explain why, if Vista had the money to make the payments between June 1997 and June 1998, it did not make any of the required installment payments. Even if (as Vista sometimes tries to suggest) it was unsure of when the installment amounts would begin to include principal as well as interest (Vista Br. 13), that is not an excuse for making no payments at all. *See 21st Century Telesis Joint Venture v. FCC*, 318 F.3d at 202 (“even if it was uncertain about the precise dollar amount, a prudent licensee would have attempted to make a reasonable effort to comply”) (citation and quotation omitted). The only conclusion that can be drawn from the facts presented by Vista is that Vista made a decision to abandon the licenses in 1997 and then changed its mind when it learned of the proposed restructuring plan for active licenses in September 1998. But by then Vista’s licenses had already automatically cancelled a full year earlier.

In its brief (but not in its filings before the Commission), Vista seeks to convert its alleged confusion about the rules into a “due process” claim, citing *Trinity Broadcasting of*

²² *See also J. Jeffery Craven, Esq.*, 16 FCC Rcd 7236 ¶ 4 (A&IAD 2001) (rejecting an IVDS licensee’s citation of confusing IVDS payment notices in 1995-1996 as justifying its failure to pay the March 31, 1997 installment).

Florida, Inc. v. FCC, 211 F.3d 618 (D.C. Cir. 2000), and *Satellite Broadcasting Co. v. FCC*, 824 F.2d 1 (D.C. Cir. 1987). Vista Br. 39-40.²³ These cases are readily distinguishable and provide no support for Vista.

Trinity and *Satellite Broadcasting* arose in circumstances where the licensee could not reasonably ascertain the Commission’s interpretation of a rule and acted on its own reasonable construction. Here, in contrast, Vista had not only the plain text of the rule, but also explicit instructions directed expressly at IVDS licensees by the Commission and FCC staff, each of which explained the operation of the installment payment rules and expressly stated that grace period requests must be filed prior to the end of the delinquency period. The operation of the rule was, therefore, “reasonably ascertainable” to Vista.

Indeed, just as in *21st Century Telesis*, Vista’s pre-default conduct – making payments for more than a year – demonstrates that it fully understood the installment payment rules. 318 F.3d at 201-02 (rejecting a licensee’s reliance on *Trinity and Satellite Broadcasting* where the licensee “plainly was not confused about the requirements because it made timely installment payments for a year prior to its default”).

C. The Commission Is Entitled To Adopt A General Policy Of Strict Enforcement Of The Installment Payment Deadlines Established In Its Rules.

This Court has recognized that an agency may adopt a policy of strict enforcement of its rules under appropriate circumstances. See *ICBC Corp. v. FCC*, 716 F.2d 926, 929 (D.C. Cir. 1983)(“rigid and consistent adherence to a policy will be upheld if it is valid”). The Court has

²³ Vista’s effort to convert its alleged confusion into a “Due Process” claim should be rejected for failure to exhaust administrative remedies under Section 405 of the Communications Act because it was not raised before the Commission. See *21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192, 199-200 (D.C. Cir. 2003). However, because the underlying “confusion” assertions were made to the Commission, we address the merits of the underlying claim here.

affirmed several Commission orders applying a strict enforcement policy for particular Commission rules. *See, e.g., 21st Century Telesis Joint Venture v. FCC, supra*, (upholding the Commission’s strict enforcement of the later version of the installment payment rule, effective after March 16, 1998, where a licensee failed to make a payment within the 180-day automatic grace period provided for in the new rules); *Mountain Solutions, Ltd. v. FCC*, 197 F.3d 512 (D.C. Cir. 1999)(strict enforcement of auction down payment deadlines); *BellSouth Corp. v. FCC*, 162 F.3d 1215 (D.C. Cir. 1999)(spectrum cap rules); *Florida Inst. of Tech. v. FCC*, 952 F.2d 549, 550 (D.C. Cir. 1992)(“cutoff” rule establishing deadlines by which applications must be filed in order to be considered for *Ashbacker* hearings); *Salzer v. FCC*, 778 F.2d 869, 875 (D.C. Cir. 1985)(strict “letter perfect” standard for certain license applications).

Here, having given licensees fair notice of how these rules applied, as well as a fair opportunity to comply with them, the Commission has strictly enforced the installment payment deadline and its consequence – automatic cancellation – based on its conclusion that strict enforcement of the payment deadline will further the policy goals of Section 309(j) and the installment payment rules.

The Commission staff summarized the Commission’s rationale for strict enforcement of the installment payment rule in ruling on Vista’s waiver request. *Division Letter*, 16 FCC Rcd at 12435-36 (JA91-92):

The underlying purpose of the default and automatic license cancellation rules, which Vista asks us to waive, is to maintain the integrity of the auction process by encouraging licensees to timely and fully comply with their payment obligations, and effectively utilize the spectrum. Strict enforcement of the Commission’s payment rules ensures that applicants have the necessary financial qualifications and that spectrum is awarded to those qualified bidders who value the spectrum most. Insisting that licensees demonstrate their ability to pay as a condition to holding licenses is essential to a fair and efficient licensing process, is fair to all participants in our auctions, including those who won licenses in the auctions and

those who did not, and fosters the promotion of economic opportunity and competition in the marketplace. (Footnotes omitted).

See also Southern Communications Systems, Inc., 15 FCC Rcd 25103, ¶ 7 (2000) (similarly explaining the Commission's rationale for strict enforcement of the installment payment rules).

This Court has likewise recognized, in a related context – strict enforcement of down payment deadlines for auctioned licenses – that the Commission may “reasonably focus on the importance of meeting payment deadlines” and adopt a policy of strict enforcement as “an ‘early warning’ that a winning bidder unable to comply with the payment deadlines may be financially unable to meet its obligation to provide service to the public.” *Mountain Solutions, Ltd v. FCC*, 197 F.3d at 518.

Finally, strict enforcement of the payment deadlines is important to the fair and efficient administration of the payment deadline itself. Otherwise, the Commission would be subjected to an endless stream of licensees, each seeking to extend the deadline envelope just a little further, and no licensee could know for sure just where the Commission’s final line on delayed payment will be drawn. In short, the installment payment deadline is the type of regulation that “require[s] a bright-line rule to be effective.” *See BellSouth Corp. v. FCC*, 162 F.3d 1215, 1225 (D.C. Cir. 1999) (referring in that case to the Commission’s spectrum cap rule, and rejecting the argument that waiver should be permitted for a *de minimus* violation of the rule).

II. THE COMMISSION PROPERLY DENIED VISTA’S REQUEST TO MODIFY THE “ELIGIBILITY” REQUIREMENTS UNDER THE RESTRUCTURING ORDER.

A. Standard Of Review

The Commission’s decision to adopt a particular rule regulating its licensees should be affirmed unless it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance

with law.” 5 U.S.C. § 706 (2)(A). Judicial review under this standard is highly deferential; the Court may not substitute its judgment for that of the agency. *Atlantic Tele-Network, Inc. v. FCC*, 59 F.3d 1384, 1388 (D.C. Cir. 1995). The Court will not disturb the decision of an agency that has “examine[d] the relevant data and articulate[d] a satisfactory explanation for its action, including a ‘rational connection between the facts found and the choice made.’” *Motor Vehicle Mfg. Ass’n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 41 (1983) (citation omitted).

B. The Commission Reasonably Rejected Vista’s Proposed Expansion Of “Eligible” Licenses.

In the *218-219 MHz Flex NPRM*, the Commission proposed to restructure the debt of the IVDS (renamed 218-218-MHz Service) licensees. A distinction between existing and cancelled licenses was necessary to the operation of the *Restructuring Order* since the purpose of the rulemaking was to give revised payment options to existing licensees. Accordingly, the Commission’s NPRM distinguished between “eligible” licensees that had retained their licenses (either through full and timely payment of all required installment payments up to that date, or filing timely grace period requests), as of March 16, 1998, and “ineligible” licensees whose licenses had previously automatically cancelled under the Commission’s rules. The Commission reaffirmed that distinction in its adoption of the *218-219 MHz Restructuring Order*,²⁴ and rejected Vista’s request to expand the definition of eligibility in the *Second Recon Order*.²⁵

On review, Vista claims that the Commission’s definition of “eligible” licensee in the *218-219 MHz Restructuring Order* was arbitrary and capricious because, according to Vista, it

²⁴ Amendment of Part 95 of the Commission’s Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, 15 FCC Rcd 1497 (JA 327).

²⁵ Second Order on Reconsideration of the Report and Order and Memorandum Opinion and Order, 15 FCC Rcd 25,020 (2000) (JA 423).

excluded licensees that filed a grace period request after the conclusion of the 90-day delinquency period. Vista Br. 37.

Of course, Vista's argument collapses in the face of the rule establishing that grace period requests must be filed within the 90-day delinquency period to be "timely filed." As demonstrated above, the Commission's rules and public statements have always clearly restricted grace period request to the "first 90 days following a missed installment payment." *See, e.g.,* Billings and Collection Branch March 26, 1996 letter. *See also James A. Stenger, Esq.,* 16 FCC Rcd 17621 (A&AID 2001) (holding that a grace period request under the same rules applicable in this case was "untimely" when it was filed three months after default on the 90th day after the installment due date).

Furthermore, as noted above, Vista did not even file a late grace period request, but rather a request that the Commission waive the automatic cancellation and grace period rules. Even if the Commission had granted Vista's requested modification and expanded eligibility to late-filed grace period requests, it would not have assisted Vista. *See J. Jeffery Craven, Esq.,* 16 FCC Rcd 7236 ¶ 3 (A&IAD 2001) ("a waiver request is not equivalent to a grace period request; and, even if IVIDCO had a waiver request on file with the Commission, it would not render IVIDCO eligible for participation in the restructuring plan").

Vista also claims that the Commission should have taken into account Vista's past "substantial payments," and belated offer to cure its past defaults, as a demonstration that Vista was willing to continue to be a licensee. Vista Br. 38. In essence, as the Commission recognized, Vista's request required the Commission to overlook an actual default and seek to measure a licensee's participation on more subjective grounds. This the Commission was unwilling to do.

Many IVDS licensees complied with the Commission's rules, made full and timely installment payments or filed timely grace period requests.²⁶ Vista has not shown why its failures to abide by the Commission's rules should be ignored or excused. The payment stoppage, failure to file a timely grace period request, and apparent lack of interest in the licenses are hardly a convincing demonstration of Vista's willingness to be a licensee and abide by the Commission's rules in the future.

But more fundamentally, the Commission's rejection of Vista's proposal is fully consistent with the Commission's general policy of strict enforcement of the installment payment rules. *See Second Recon Order*, ¶ 27 (JA 435). The Commission has regularly rejected requests to permit late payments after the default deadline. *See, e.g., Southern Communications Systems, Inc.*, 16 FCC Rcd 18357 (2001); *21st Century Telesis, Inc.*, 15 FCC Rcd 25113 (2000), *aff'd on recon*, 16 FCC Rcd 17257 (2001), *aff'd*, *21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192 (D.C. Cir. 2003).

Vista's "substantial payments" test was also rejected as administratively unworkable and inherently arbitrary. How many payments, short of compliance with the rules, are enough? *See Second Recon Order*, ¶ 27 (JA 435) ("such a subjective test would be difficult and would invite challenge on the basis of being arbitrary"). Given the Commission's policy of strict enforcement, the decision to reject Vista's proposed expansion of the "eligibility" criteria was reasonable and appropriate.

²⁶ Indeed, the list of licenses eligible under the Restructuring Order runs 6 pages long. *See* Public Notice: Wireless Telecommunications Bureau Announces Revised Election Date (January 31, 2001) And Amended Eligibility List For 218-219 MHz Service, 16 FCC Rcd 5937 (WTB 2001).

Finally, Vista contends that it was unfair of the Commission to exclude it from eligibility for restructuring in view of the unique circumstances and financial difficulties faced by IVDS licensees. Vista Br. 37-38. However, in crafting the appropriate relief for ineligible licensees, the Commission was “cognizant that some entities have shown good faith by making late installment payments, while others have been incapable of working within the Commission’s rules due to myriad intervening factors” such as lack of suitable equipment that caused financial distress to IVDS licensees. *218-219 MHz Restructuring Order*, ¶ 38 (JA 350). For that reason, the Commission also granted all ineligible licensees a full refund of all of their past installment payments, plus full debt forgiveness for the remaining balances on their auction debt. *Id.* This was essentially the same relief given to any “eligible” licensee that elected amnesty under the *218-219 MHz Restructuring Order*. See *id.* at ¶ 50 (JA 357). Accordingly, although Vista did not get the full measure of restructuring relief that it desired from the Commission, it was not treated unfairly and it was given “generous” relief in the *Restructuring Order*. *Second Recon Order*, ¶ 29 (JA 436).

In short, the Commission’s eligibility determination finely “balance[d]” two competing Commission goals – “the need to maintain the integrity of the auction system, with the desire to assist licensees that might be experiencing financial difficulties.” *Second Recon Order*, ¶ 26 (JA 435). The Court should not interfere with the balance the Commission crafted.

III. THE COMMISSION PROPERLY DENIED VISTA’S REQUEST FOR A WAIVER OF THE AUTOMATIC CANCELLATION AND GRACE PERIOD RULES.

A. Standard Of Review.

An entity requesting a waiver must demonstrate that either (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application in the instant case, and that

a grant of the requested waiver would be in the public interest; or (ii) in view of unique or unusual factual circumstances in the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative. 47 C.F.R. § 1.925(b)(3). The *Division Letter*, *Bureau Order*, and *Commission Order* (collectively the *Waiver Orders*) found that Vista's waiver request failed on both grounds.

The standard for reviewing the Commission's denial of a waiver request is extremely deferential: "[A]n agency's refusal to grant a waiver will not be overturned unless the agency's reasons are so insubstantial as to render that denial an abuse of discretion. *Mountain Solutions, Ltd., Inc. v. FCC*, 197 F.3d 512, 517 (D.C. Cir. 1999), *quoting Green Country Mobilephone, Inc. v. FCC*, 765 F.2d 235, 238 (D.C. Cir. 1985). The Commission's action in this case easily satisfies this lenient standard.

B. Vista Has Not Met Its Heavy Burden To Show That The Commission Abused Its Discretion In Refusing To Give Vista A Waiver From Strict Enforcement Of The Installment Payment Deadlines.

Having rejected Vista's request to expand the definition of eligibility, the *Waiver Orders* could have simply refused to consider Vista's request for a waiver since the reasons for the waiver were identical to the already rejected request to expand eligibility and the resulting relief would have been the same. *See Turro v. FCC*, 859 F.2d 1498, 1500 (D.C. Cir. 1988) (upholding the Commission's decision to address via rulemaking, rather than through individual ad hoc waiver proceedings, two questions of policy that were virtually identical to each other, one raised by way of a waiver request and the other by way of petition for reconsideration). *See also Warren Price Communications, Inc.*, 7 FCC Rcd 6850, ¶ 2 (1992) ("It is well established that

reconsideration will not be granted to debate matters upon which we have already deliberated and spoken”).

The Commission and its staff, however, took a hard look at Vista’s waiver request and rejected it on the merits. In view of the Commission’s strict enforcement policy for installment payment deadlines, Vista has a particularly heavy burden. Vista has neither shown the extraordinary circumstances, nor inconsistency in treatment of similarly situated parties, required by this Court to overcome the Commission’s strict enforcement policy.

**(1) The *Waiver Orders* Gave Vista’s Waiver Request
The Requisite “Hard Look” Review.**

Not satisfied with the outcome of the Commission’s waiver decision, Vista charges that the Commission “gave short shrift” to Vista’s arguments. Vista Br. 22. However, as the Bureau found in rejecting this same argument on reconsideration, “Vista’s request for waiver of the automatic cancellation and grace period provisions of the installment payment rules was denied, not because the Division failed to consider the request as required under the ‘hard look’ standard, but because it found, as we do here, that Vista has not met the Commission’s standards for granting a waiver request.” *Bureau Order*, ¶ 16 (JA 172).

A review of the *Waiver Orders* confirms that they addressed each of the specific areas challenged as inadequate in Vista’s brief. For example, Vista claims that “the Commission never addressed the basis for Vista’s failure to file a grace period request prior to filing the Waiver Request.” Vista Br 23. In fact, the *Division Letter* dealt directly with Vista’s asserted confusion about the requirements of a timely filed grace period, rejecting Vista’s claim of confusion and finding that Vista was given “ample notice” of the rule requirements. *Division Letter*, 16 FCC Rcd at 12432-34 (JA 88-90).

Likewise, Vista complains that the Commission did not examine its “substantial payments” or the alleged “benefits” of a waiver grant to the public interest, or its offer to cure its default retroactively. Vista Br. 24-25. In fact, the *Division Letter* included an extensive discussion of the purpose of the rule and the public interest served by strict enforcement where a licensee defaults, rejecting Vista’s claimed benefits as “unavailing.” *Division Letter*, 16 FCC Rcd at 12435 (JA 91).

The *Waiver Orders* also addressed Vista’s claim that a waiver was necessary to treat Vista equitably in light of its claim that it had made more installment payments than some “eligible” licensees. Vista Br. 25. The *Waiver Orders* dealt with that claim by referring back to the Commission’s rejection of the same argument in the *Second Recon Order*. *Division Letter* 16 FCC Rcd at 12435 (JA 91); *Bureau Order*, ¶ 17 (JA 172); *Commission Order*, ¶ 17 (JA 206). The Commission was entitled to rely on its considered conclusions in the rulemaking proceeding in assessing the merits of the waiver request, and reference to those conclusions was not a failure to give the waiver request a “hard look.”

At bottom, Vista’s complaint is focused on the *Waiver Orders*’ determination that strict construction and enforcement of the installment payment rule better serves the public interest than granting Vista’s waiver request. But the determination to apply strict enforcement is not inconsistent with a “hard look” requirement. As the Court explained in *BellSouth Corp. v. FCC*, 162 F.3d at 1225:

[A]n agency that is required to give a “hard look” at a waiver request is not necessarily required to have an existing waiver policy for all of its rules. The “strict adherence to a general rule may be justified by the gain in certainty and administrative ease, even if it appears to result in some hardship in individual cases.” *Turro v. FCC*, 859 F.2d 1498, 1500 (D.C. Cir. 1988); *see also FCC v. WNCN Listeners Guild*, 450 U.S. 582, 601 n.44 (1981); *Thomas Radio Co. v. FCC*, 716 F.2d 921, 925 & n.20 (D.C. Cir. 1983). Rigid and consistent adherence

to a policy will be upheld if it is valid. *ICBC Corp. v. FCC*, 716 F.2d 926, 929 (D.C. Cir. 1983) [full case citations supplied].

In short, “[t]he agency’s strict construction of a general rule in the face of waiver requests is insufficient evidence of an abuse of discretion.” *Mountain Solutions, Ltd., Inc. v. FCC*, 197 F.3d at 517.

(2) The Commission Did Not Abuse Its Discretion In Denying A Waiver Under The Circumstances Presented By Vista’s Default.

For the “special circumstances” warranting a waiver, Vista argues that the payment requirements were confusing (Vista Br. 31), and it did not understand that it could file a grace period (*id.* at 33). More broadly, Vista waxes about the “myriad of intervening factors” – the collapse of the IVDS technology – that the Commission recognized as justifying the restructuring of the IVDS licenses. *Id.* at 30. The Commission did not abuse its discretion in finding that these grounds did not warrant a waiver excusing Vista’s non-compliance with the rules.

While it seeks to cloak its defaults in the general “myriad of intervening factors,” Vista’s brief ignores the fact that many IVDS licensees did comply with the installment payment rules, and many licensees did file grace period requests within the time prescribed.²⁷ The poor circumstances of the IVDS service in general may have warranted service-wide restructuring, but that alone does not mandate a waiver for an individual licensee that utterly failed to comply with the same rules that others were able to meet. Moreover, as the *Waiver Orders* noted, the *218-219 MHz Restructuring Order* made “generous” provisions for “ineligible” licensees – full refund of all installment payments made as well as full forgiveness of all outstanding debt. *Division Letter*, 16 FCC Rcd at 12436 (JA 92). In view of the relief already granted in the Restructuring

²⁷ See note 26, *supra*.

Order, further relief through a waiver grant because of the troubles encountered by all IVDS licensee was not warranted.

Given the significance of Vista's payment default, Vista's brief (as well as its filings before the Commission) is shockingly sparse in explaining just why Vista stopped making payments after the March 1997 quarter. The only explanation Vista provides this Court for its abandonment of all installment payments after March 1997 is a non-sequitur (Vista Br. 33):

Vista's failure to make installment payments was not due to a lack of financial resources, or financial distress, but to a lack of understanding that it was required to file a grace period request.

The Commission readily saw through Vista's efforts to cloud its 1997 payment default with claims that the Commission's payment requirements were in a state of confusion during 1995-1996. As the Commission noted (and Vista now concedes),²⁸ Vista was given a new installment schedule in March 1996 and instructed that quarterly payments were due beginning on March 31, 1996, and Vista made payments under that schedule for a year before it stopped cold. The *Waiver Orders* rightfully rejected any claim of confusion arising from 1995-1996 as irrelevant to Vista's compliance with the installment payment rules in 1997.

Vista also asserts that its "lack of understanding of the grace period rule was a substantial factor supporting waiver." Vista Br. 24. As the *Division Letter* found, Vista had ample information about the requirements of the rules – including the staff's *Grace Period Clarification PN*, the Commission's *Omnibus IVDS Order*, and the Billings and Collection Branch's March 29, 1996 letter – each of which specified in unambiguous language that a grace

²⁸ Vista concedes that the March 29, 1996 Billings and Collection Branch letter clarified that installment payments were not stayed through September 1999, and admits that "Vista did not interpret that communication to the contrary." Vista Br. 31.

period must be filed within the 90-day delinquency period. *Division Letter*, 16 FCC Rcd at 12434 (JA 90). The Commission did not abuse its discretion in concluding that Vista's asserted ignorance of the law did not warrant a waiver.

(3) The Commission Did Not Abuse Its Discretion In Finding That A Waiver Grant Would Not Serve The Underlying Purpose Of The Installment Payment Rule.

Vista also argues that a waiver would serve the underlying purpose of the installment payment rule because it would permit a small business to retain its licenses (Vista Br. at 28-29). The FCC fully addressed and rejected this argument.

Although assistance to small businesses is one of the purposes of the Communications Act that the Commission is required to balance, the issue in the Vista Waiver Request was narrower – what is the best way to accomplish the specific purpose of the installment payment rules, which implement the full and timely payment requirement for small businesses paying their bid through installments. The *Waiver Orders* concluded that “the underlying purpose of the default and automatic cancellation rules, which Vista asks us to waive, is to maintain the integrity of the auction process by encouraging licensees to timely and fully comply with their payment obligations and effectively utilize the spectrum.” *Division Letter*, 16 FCC Rcd 12435 (JA 91). The *Waiver Orders* recognized that strict enforcement of the installment payment deadlines is the best way to accomplish that purpose, and that granting Vista's waiver request would undermine that specific purpose. *Id.* Vista provides no rationale for why this general strict enforcement policy should be waived in light of Vista's default, nor does it attempt to explain how granting it a waiver will foster better compliance with the rules by other licensees.

Finally, Vista asserts that it was always ready and able to make the installment payments, and thus met the fundamental purpose of the rule to demonstrate its financial capability to put the licenses to their most efficient use. Vista Br. 29. However, Vista's *ipse dixit* that it was always financially capable of making the payments raises the question why it failed to make the required payments when it knew, or should have known, that the licenses would automatically cancel. Based on the totality of the circumstances – the failure to pay or to request a grace period, or any correspondence with the Commission about the licenses for over a year – the *Waiver Orders* properly concluded that granting Vista a waiver of the strict application of the installment payment rule here would be contrary to the underlying purpose of the rule. *Division Letter*, 16 FCC Rcd at 12436 (JA 92).

**(4) The Denial Of A Waiver Was Not Inconsistent
Other Commission Decisions.**

Vista asserts that the *Waiver Orders* are inconsistent with two lines of cases where the Commission granted relief to licensees that failed to comply with payment deadlines. The *Bureau Order* carefully reviewed the precedent cited by Vista and explained why the precedent is inapposite to Vista's facts.

**(a) The *Waiver Orders* Are Not Inconsistent
With The “Constructive Waiver” Cases.**

Vista relies on *Lancaster Communications*, 1998 WL 709412 (WTB, 1998), and *TE-MCG Consortium*, 14 FCC Rcd 2173 (WTB 1999) in support of granting a waiver here. Vista Br. 35. In these cases, the FCC staff recognized that, as a result of administrative oversight, it had permitted these licensees, whose licenses has automatically cancelled under the installment payment rules, to make additional installment payments as if their licenses continued to exist. Because of the FCC's conduct in inadvertently accepting the continued installment payments, the

FCC staff treated the situation as a “constructive waiver” of the automatic cancellation rule. “[I]t was the Commission’s administrative oversight, and not the licensee’s, that amounted to a constructive waiver.” *Inforum Communications, Inc.*, 2004 WL 41939 (FCC) (Auctions and Spectrum Access Division, January 8, 2004) at ¶ 11.

As the *FCC Orders* recognized, the facts involving Vista’s default are entirely different. *Bureau Order*, ¶ 21 (JA 174). Unlike the licensees in the constructive waiver cases, Vista ceased making all payments, and the Commission did not act in a way that could have been construed as encouraging further payments. Vista does not contend otherwise. Vista Br. 33 (“Vista’s circumstances do not include evidence of an inadvertent ‘constructive’ waiver”). *See also Russell H. Fox, Esq.*, 16 FCC Rcd 11786 (A&AID 2001) (distinguishing the “constructive waiver” cases from cases where, as here, the licensee ceased making any payments and then filed a request for waiver nine months after cancellation occurred).

Vista contends that its offer to cure its default and pay the outstanding balance due in full brings the case within the ambit of the constructive waiver cases. Vista Br. 35. The Commission is not compelled by the constructive waiver cases to accept Vista’s offer. The Commission’s inadvertent acceptance of payment requests in the constructive waiver cases does not mean that the agency must continue to repeat the same error in a later case when it is aware of the cancellation and refuses to accept a late payment. *See Request for Extension of the Commission’s Initial Non-Delinquency Period for C and F Block Installment Payments*, Memorandum Opinion and Order, 14 FCC Rcd 6080 (1999), *aff’d per curiam sub nom. Southeast Telephone, Inc. v. FCC*, 1999 WL 1215855 (D.C. Cir. November 24, 1999) (unpublished opinion). *See also Chem-Haulers, Inc. v. ICC*, 565 F.2d 728, 730 (D.C. Cir. 1977); *Texas International Airlines v. CAB*, 458 F.2d 782, 785 (D.C. Cir. 1971).

(b) The Waiver Orders Are Not Inconsistent With The “Down-Payment Waiver” Cases.

Vista also relies on several Commission decisions waiving the deadline for down payments for auctioned licenses. The Commission has granted a partial waiver of a down payment deadline where the winning bidder’s failure to make a timely down payment was based on inadvertent error, the bidder immediately remitted payment, and the bidder provided evidence of an ability to pay at the time of the original deadline. *See Mountain Solutions, Ltd v. FCC*, 197 F.3d 512, 518 (D.C. Cir. 1999) (noting that in the down payment waiver cases, winning bidders “demonstrated their financial qualifications both by the circumstances surrounding the failure to meet that payment deadline *and by tendering payment immediately upon being notified of their delinquency or mistake*”)(emphasis added).

The Commission has recognized that the down payment waiver cases have no application where a licensee fails to make a required installment payment. The two rules differ both in terms of the amount of time the rules permit for making such payments,²⁹ and the purposes served by enforcement of the rules. *See Southern Communications Systems, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 25103, ¶¶ 13-15 (2000) (distinguishing the analysis of requests for waiver of the installment payment rules from requests for waiver of the down payment rules in light of the different provisions and purposes of those rules).

The down payment waiver cases have no application to Vista’s circumstances. In contrast to the inadvertent error, promptly remedied, in the down payment cases, Vista

²⁹ For example, a down payment must be made within five or ten days of a Commission notification to the winning bidder, and the Commission recognized that leeway for mistakes should be given in light of the short time permitted, whereas the installment payment rules permitted a licensee 90 days to make a payment on a known schedule.

consciously chose not to make a payment and continued to refuse to do so over an extended period of time. Vista was wholly responsible for the consequences of its decisions under the rules. In light of these critical distinctions in the fact patterns, the Commission did not abuse its discretion in denying Vista's waiver request.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for review the Commission's *218-219 MHz Restructuring Order*, and affirm the Commission's waiver denial.

Respectfully submitted,

R. HEWITT PATE
ASSISTANT ATTORNEY GENERAL

JOHN A. ROGOVIN
GENERAL COUNSEL

MAKAN DELRAHIM
DEPUTY ASSISTANT ATTORNEY GENERAL

DANIEL M. ARMSTRONG
ASSOCIATE GENERAL COUNSEL

CATHERINE G. O'SULLIVAN
ANDREA LIMMER
ATTORNEYS

STEWART A. BLOCK
COUNSEL

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740 (TELEPHONE)
(202) 418-2819 (FAX)

February 6, 2004

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

VISTA COMMUNICATIONS, INC.,)	
)	
PETITIONER/APPELLANT,)	
)	
V.)	
)	
FEDERAL COMMUNICATIONS COMMISSION AND UNITED)	Nos. 01-1168 AND 03-1281
STATES OF AMERICA,)	
)	
RESPONDENTS/APPELLEE.)	
)	
)	
)	

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Respondents/Appellee" in the captioned case contains 13682 words.

STEWART A. Block
COUNSEL
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740 (TELEPHONE)
(202) 418-2819 (FAX)

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